

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KEVIN SCOTT DAVIS,

Plaintiff,

vs.

CLARK COUNTY DETENTION CENTER,
et al.,

Defendants.

2:09-cv-02196-RCJ-LRL

ORDER

This prisoner civil rights action comes before the Court for initial review under 28 U.S.C. § 1915A as well as on plaintiff's motion (#12) for a temporary restraining order and motion (#13) for a preliminary injunction.

Screening

When a "prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," the court must "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b).

In considering whether the plaintiff has stated a claim upon which relief can be granted, all material factual allegations in the complaint are accepted as true for purposes of initial review and are to be construed in the light most favorable to the plaintiff. *See, e.g., Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). However, mere legal conclusions unsupported by any actual allegations of fact are not assumed to be true in reviewing the

1 complaint. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949-51 & 1954, 173 L.Ed.2d 868
 2 (2009). That is, bare, naked and conclusory assertions that merely constitute formulaic
 3 recitations of the elements of a cause of action and that are devoid of further factual
 4 enhancement are not accepted as true and do not state a claim for relief. *Id.*

5 Further, the factual allegations must state a plausible claim for relief, meaning that the
 6 well-pleaded facts must permit the court to infer more than the mere possibility of misconduct:

7 [A] complaint must contain sufficient factual matter,
 8 accepted as true, to "state a claim to relief that is plausible on its
 9 face." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127
 10 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007).] A claim has facial
 11 plausibility when the plaintiff pleads factual content that allows
 12 the court to draw the reasonable inference that the defendant is
 13 liable for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. The
 14 plausibility standard is not akin to a "probability requirement," but
 15 it asks for more than a sheer possibility that a defendant has
 16 acted unlawfully. *Ibid.* Where a complaint pleads facts that are
 "merely consistent with" a defendant's liability, it "stops short of
 the line between possibility and plausibility of 'entitlement to
 relief.'" *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

... [W]here the well-pleaded facts do not permit the court
 to infer more than the mere possibility of misconduct, the
 complaint has alleged - but it has not "show[n]" - "that the pleader
 is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

17 *Iqbal*, 129 S.Ct. at 1949-50.

18 Allegations of a *pro se* litigant are held to less stringent standards than are formal
 19 pleadings by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d
 20 652 (1972).

21 In the complaint, plaintiff Kevin Scott Davis seeks compensatory damages against
 22 multiple defendants in their individual and official capacity on multiple claims arising from his
 23 criminal prosecution in Las Vegas and his detention at the Clark County Detention Center.
 24 The Court addresses each count in turn.

25 **Count I**

26 In Count I, plaintiff seeks damages from assistant public defender Jason Trauth, the
 27 Clark County Public Defender's Office, and Assistant Clark County Manager Jeff Wells based
 28 on allegations that plaintiff was denied effective assistance of counsel in his recent state

1 criminal proceeding. The complaint alleges that plaintiff entered a plea and has been
2 sentenced. The complaint does not allege that the conviction has been overturned.

3 Count I does not present a cognizable claim under Section 1983 under *Heck v.*
4 *Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Under *Heck*, a claim that
5 necessarily implies the invalidity of a state court conviction may not be considered in a civil
6 rights action unless and until the judgment of conviction is invalidated, which plaintiff does
7 not allege and apparently cannot allege has occurred with regard to the recent conviction.
8 Because the claim is not cognizable in the first instance, the Court has no occasion to
9 consider whether state action can be established on the claim against the assistant public
10 defender who represented plaintiff and/or whether plaintiff has alleged a sufficient factual
11 basis for liability against the remaining defendants on Count I.

12 **Count II**

13 Count II spans eighteen single-spaced pages and asserts a multitude of alleged Eighth
14 Amendment claims associated with plaintiff's detention at the Clark County Detention Center.
15 The count includes claims that plaintiff was denied bail or that excessive bail was required;
16 that he was denied emergency care following his arrest; that his prescription medications,
17 including oxycodone, Soma, and Xanax, were confiscated during intake; that he was not given
18 the proper medication during his detoxification and withdrawal from opiates; that he was
19 required to make up his bed, stand in a food line and eat at a dining table while undergoing
20 withdrawal; that he was placed in punitive confinement even before receiving a writeup; that
21 he was moved to a different unit to create space in the medical unit; that he was only given
22 an EKG when he complained of chest pain, headaches, passing out and back, leg and hip
23 pain; that his seizures were not diagnosed and he was not provided proper medication; that
24 proper channels were not in place for requesting treatment; that he was not informed of x-ray
25 results; that he again was moved to a different unit; that there was a lack of proper
26 administration of medical services and general disorganization; that he was not protected
27 from injuring himself during seizures; that he was moved to a suicide watch cell; that he was
28 not provided a recommended CT scan; that a kite regarding a wrist injury was not properly

1 responded to; that he was improperly denied methadone; that he was not provided a proper
2 splint for his wrist injury; that he was denied opiate pain medication; that there was no policy
3 in place to protect detainees from abuse, neglect and recklessness; that there was no follow
4 through as to a spot in his lung shown on an x-ray; that Tylenol-3, which includes an opiate,
5 was not available or was not provided to him at various pill calls; that blood pressure checks
6 were not provided as frequently as ordered after he was diagnosed with hypertension; that
7 there was no policy in place to ensure that one doctor's orders could not be overridden
8 without just cause; that the medical unit was too cold; that the showers were too cold; that
9 blood was drawn from inmates on the same tables from which they ate; that no exercise was
10 provided; that plaintiff was unable to go to church, school, alcoholics anonymous meetings
11 or narcotics anonymous meetings, and that the medical unit was unsanitary because sick
12 inmates were vomiting and urinating all over the unit.

13 Count II is subject to multiple deficiencies.

14 First, putting the bail claim to one side for the moment, the Eighth Amendment does
15 not apply to claims brought by pretrial detainees regarding conditions of confinement. The
16 constitutional protections available to detainees regarding their conditions of confinement
17 instead arise under the Due Process Clause of the Fourteenth Amendment, although the
18 Fourteenth Amendment provides no less protection than the Eighth Amendment in this
19 context. *See, e.g., Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003).

20 Second, under Local Rule LSR 2-1, plaintiff must use the Court's required Section
21 1983 form to state his claims, and he must follow the instructions for that form in doing so.
22 The instructions clearly state, with the following emphasis: "YOU MAY ALLEGE THE
23 VIOLATION OF ONLY ONE CIVIL RIGHT PER COUNT." Plaintiff may not, as he has done
24 in Count II, assert multiple civil rights violations under one count, even if they allegedly all
25 arise under one constitutional amendment. He instead must assert one constitutional
26 violation per count.

27 Third, Count II contains multiple references directing the reader to "see" various intake
28 records, medical records, kites or other materials. Plaintiff must state his constitutional claims

1 within the body of the complaint itself without such general references to other documents.
2 The allegations within the body of the complaint must state a claim. If they do not,
3 generalized references to other documents will not save the complaint from dismissal.

4 Fourth, plaintiff must make specific allegations as to the involvement of each defendant
5 within the body of the complaint on each claim. Repeatedly, plaintiff refers to a number of
6 defendants with respect to a particular date and then includes specific allegations as to an
7 act or omission by only one or possibly two of the defendants. On each claim, as to each
8 defendant sued on that claim, plaintiff must allege specifically what each defendant did or
9 failed to do that caused him harm with regard to that claim.

10 Fifth, the Clark County Detention Center is not a viable defendant. The Clark County
11 Detention Center is a building. Plaintiff can sue a natural person or a juridical person such
12 as a corporation or a municipality. He may not sue, however, a building or a correctional
13 facility, which is not a juridical person subject to suit.

14 Sixth, the bail claim under Count II – which is asserted against the Clark County
15 Detention Center – thus is not asserted against a viable defendant. Bail in any event is set
16 by a court, not by the detention center.

17 Seventh, on plaintiff's multitudinous different claims regarding his medical care in
18 Count II, the allegations presented fail to state a claim upon which relief may be granted.
19 Count II is presented as a near daily diary of the medical care provided to plaintiff at the
20 facility. At various points in the recital, plaintiff asserts sundry variations of the conclusory
21 incantation: "Deliberate indifference to a serious medical need and pain and suffering." Such
22 talismanic recitations of the elements of a cause of action fail to state a claim for relief. *Iqbal*,
23 *supra*. Rather, in order to state a claim for relief for deliberate indifference to serious medical
24 needs, plaintiff must present factual allegations tending to establish that the defendant official
25 knew of and disregarded an excessive risk to inmate health or safety. *See, e.g., Simmons v.*
26 *Navajo County, Arizona*, ___ F.3d ___, 2010 WL 2509181, at *4 (June 23, 2010). The official
27 both must be aware of the facts from which the inference of an excessive risk to inmate health
28 or safety could be drawn, and he also must draw the inference. *Id.* In other words, a plaintiff

1 must show that the official was "(a) *subjectively aware* of the serious medical need and (b)
2 failed adequately to respond." *Id.*, (quoting prior authority, with emphasis in original).
3 Medical misdiagnosis, differences in medical opinion, medical malpractice, and negligence
4 do not amount to deliberate indifference. *See, e.g., McGuckin v. Smith*, 974 F.2d 1050, 1059
5 (9th Cir.1992), *rev'd on other grounds*, *WMX Tech., Inc. v. Miller*, 104 F.3d 1133 (9th
6 Cir.1997)(*en banc*); *Sanchez v. Vild*, 891 F.2d 240, 241-42 (9th Cir.1989).

7 The allegations in Count II fail to state a claim in this regard. For example,
8 confiscating prescription medication, especially opiates, from a detainee on being placed into
9 a jail clearly does not violate the Constitution. Nor does the mere fact that a health care
10 provider denies opiates to a detainee who, under plaintiff's own allegations, has clear opiate
11 dependence issues constitute deliberate indifference to a serious medical need -- regardless
12 of whether another health care provider inside or outside of the institution prescribed the
13 opiates.

14 In this same vein, many of the medical issues alleged in Count II are largely unrelated.
15 For example, the failure to provide opiate medication is unrelated to a failure to follow through
16 with a recommendation to perform a CT scan as to a spot on plaintiff's lung. Plaintiff should
17 set forth the separate claims as to separate alleged denials of medical care in separate
18 counts with factual allegations from which the above-described inferences can be drawn, as
19 to each defendant named in each count. Plaintiff should focus on stating a claim as to each
20 different medical issue as to which he seeks relief rather than providing a mere chronological
21 daily summary of his medical care at the Clark County Detention Center.

22 **Count III**

23 Count III combines three different categories of claims. Plaintiff, again, must assert
24 one constitutional violation per count and he may not assert multiple civil rights violations
25 under one count.

26 First, plaintiff alleges that from November 16, 2007, through March 30, 2009, two John
27 Doe defendants and defendant Assistant Clark County Manager Jeff Wells violated his right
28 to due process. He alleges that they did so every day that plaintiff could not leave Las Vegas

1 due to a court order ordering him to check in for pretrial supervision once a week as a
2 condition of his release from custody due to the allegedly wrongly-filed charges in the state
3 criminal prosecution. Allegations only that plaintiff had to report to pretrial supervision
4 pursuant to a court order as a condition of release do not state a viable claim as to these
5 defendants. Plaintiff alleges no personal involvement by Wells or the other defendants giving
6 rise to liability. Further, under *Heck*, plaintiff may not seek damages for a custodial restraint
7 pursuant to a state court order that has not previously been set aside.

8 Second, plaintiff in the main repeats the allegations from Count I challenging the
9 competency of his representation by the county public defender's office in his state criminal
10 prosecution. For the reasons discussed as to Count I, these allegations fail to state a
11 cognizable claim and are barred by *Heck*.

12 Third, plaintiff seeks to reassert the multitudinous allegations of Count II *in globo*
13 instead also as a violation of the Due Process Clause of the Fourteenth Amendment. While
14 plaintiff thus seeks to properly invoke the Fourteenth Amendment rather than the Eighth
15 Amendment, the incorporated allegations fail to state a claim for relief for the remaining
16 reasons discussed under Count II.

17 Accordingly, the foregoing considered as to the Counts I through III, the complaint will
18 be dismissed without prejudice, subject to an opportunity to file an amended complaint
19 correcting the deficiencies in the original complaint, to the extent possible.

20 ***Motion for Temporary and Preliminary Injunctive Relief***

21 In the motion (#12) for a temporary restraining order and motion (#13) for a preliminary
22 injunction, plaintiff seeks wide-ranging temporary and preliminary injunctive relief as to
23 conditions of confinement not at Clark County Detention Center but instead at High Desert
24 State Prison ("High Desert"). He seeks an order, *inter alia*, directing "HDSP" to pay for his
25 postage and copywork charges in challenging allegedly illegal disciplinary charges against
26 him; barring the imposition of any further disciplinary sanctions against plaintiff until the
27 prison's disciplinary procedures are declared legal; restraining "HDSP" from charging plaintiff
28 in any way for copywork or postage as a result of the allegedly illegal disciplinary procedures;

1 restraining "HDSP" from freezing his inmate account; ordering further diagnostic testing by
2 medical personnel outside of the prison; ordering an immediate refill of the medications
3 prescribed prior to his arrest, including the opiates; ordering that he be transported to the
4 outside pain management doctor that prescribed the opiates prior to his arrest; ordering that
5 his prescriptions be filled by an outside pharmacy until arrangements are made for a prison
6 pharmacy; order an appointment with Clark County Social Services regarding his medical
7 bills; ordering an immediate transfer of plaintiff to a different classification level and then,
8 after his medical treatment issues are resolved, to Southern Desert Correctional Center;
9 ordering the replacement of two blue shirts that plaintiff had to "modify" due to there being no
10 toilet paper and reimbursement of plaintiff for the charges for the shirts; ordering
11 reimbursement of plaintiff for the toilet paper that he had to buy at the prison store; ordering
12 that plaintiff be given direct physical access to the prison law library for legal research;
13 restraining any type of "harassment" through illegal cell searches or verbal or physical
14 threats; restraining Correctional Officer Everist from verbally threatening plaintiff or coming
15 into any type of contact with him; and restraining "HDSP" from trying to "influence" the
16 medical treatment that plaintiff receives with statements such as "he's faking it," "inmates are
17 not allowed these types of medications," and/or "he's a drug addict."

18 Plaintiff asserts that he has moved for temporary and preliminary injunctive relief "now
19 only because another inmate (not a law clerk) told plaintiff he might get help this way." #12,
20 at 3, lines 9-10.

21 The motion will be denied for several reasons.

22 First, the complaint presents claims against defendants in Clark County regarding
23 plaintiff's state criminal prosecution in Clark County and the conditions of his confinement at
24 Clark County Detention Center. The pleadings present no claims regarding plaintiff's
25 incarceration at High Desert State Prison, and he has named no defendants in any capacity
26 with regard to that facility. The mere filing of a complaint presenting some claims against
27 some defendants as of some point in time does not make this lawsuit a clearinghouse for all
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1 of plaintiff's disputes that may arise thereafter. Plaintiff may not pursue a motion for injunctive
2 relief as to claims that are not presented by the pleadings.

3 Second, the complaint in any event seeks monetary damages, not injunctive relief.

4 Third, plaintiff has failed to provide the verification and certification required under
5 Rule 65(b)(1) of the Federal Rules of Civil Procedure for issuance of a temporary restraining
6 order without both notice to the adverse party and an opportunity to be heard.

7 Fourth, plaintiff does not even name a viable adverse party in the motions to whom a
8 temporary restraining order and/or preliminary injunction could be directed. High Desert
9 State Prison is a correctional facility, not a viable defendant to whom an injunction may be
10 directed.

11 Fifth, plaintiff has not stated a colorable claim of irreparable injury as to many of his
12 requests for injunctive relief. Filing a motion for temporary injunctive relief because another
13 inmate thought that it would be a good idea does not establish irreparable injury.

14 Sixth, the underlying complaint currently is subject to dismissal for failure to state upon
15 which relief may be granted.

16 IT THEREFORE IS ORDERED that the Clerk of Court shall file the complaint and that
17 the complaint is DISMISSED without prejudice for failure to state a claim upon which relief
18 may be granted, subject to leave to amend within thirty (30) days of entry of this order to
19 correct the deficiencies in the complaint, if possible.

20 IT FURTHER IS ORDERED that, on any such amended complaint filed, plaintiff shall
21 clearly title the amended complaint as an amended complaint by placing the word
22 "AMENDED" immediately above "Civil Rights Complaint" on page 1 in the caption and shall
23 place the docket number, 2:09-cv-02196-RCJ-LRL, above the word "AMENDED" in the space
24 for "Case No." Under Local Rule LR 15-1 any amended complaint filed must be complete in
25 itself without reference to prior filings. Thus, any allegations, parties, or requests for relief
26 from prior papers that are not carried forward in the amended complaint no longer will be
27 before the Court.

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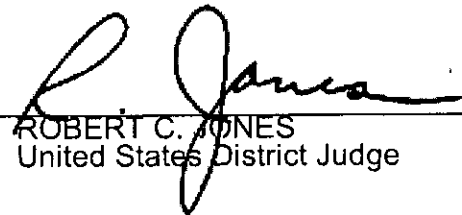
1 IT FURTHER IS ORDERED that plaintiff's motion (#12) for a temporary restraining
2 order and his motion (#13) for a preliminary injunction both are DENIED.

3 The Clerk of Court shall provide plaintiff with a copy of the complaint together with two
4 copies of a Section 1983 complaint form and one copy of the instructions for same.

5 If an amended complaint is filed in response to this order, the Court will screen the
6 amended pleading before ordering any further action in this case.

7 If plaintiff does not timely mail an amended complaint to the Clerk for filing, a final
8 judgment dismissing this action will be entered. If the amended complaint does not correct
9 the deficiencies identified in this order and otherwise does not state a claim upon which relief
10 may be granted, a final judgment dismissing this action will be entered.

11 DATED: This 3rd day of August, 2010.

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15 ROBERT C. JONES
16 United States District Judge
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